

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFF L. RADER and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Moose, WY

*Docket No. 01-237; Oral Argument Held March 12, 2002;
Issued April 16, 2002*

Appearances: *Jeff L. Rader, pro se; Miriam D. Ozur, Esq.*, for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of retail manager.

The Office accepted appellant's claim for cervical strain, herniated nucleus pulposus and right shoulder sprain. Appellant was paid total disability compensation since March 30, 1997.

In a report dated November 11, 1996, Dr. Kenneth L. Lambert, a Board-certified orthopedic specialist, stated that appellant should not lift more than 10 pounds intermittently and should not do any prolonged sitting, kneeling, bending, stopping or twisting.

On February 24, 1998 the rehabilitation counselor, Jerry L. Zook, identified the job of real estate appraiser as one that appellant was professionally qualified to perform, was within his physical restrictions and was reasonably available in Jackson Hole, Wyoming. The weekly wage was listed as \$769.00. In a narrative report dated February 27, 1998, Mr. Zook stated that appellant permanently lived in Jackson Hole, Wyoming but was living in Kalispell, Montana to be near his children. He stated that appellant was performing voluntary real estate work with David Heine & Associates, a real estate appraisal firm in Kalispell, Montana. Mr. Zook stated that in order to become a certified real estate appraiser, appellant would have to complete a 2000 hour apprenticeship with the Association of Farm Managers and Rural Appraisers, Incorporation located in Denver, Colorado. He called one real estate agency who told him that a starting salary for a real estate appraiser was \$20,000.00 and could go up to \$35,000.00 to \$40,000.00 a year. Mr. Zook stated that there were 10 full-time real estate appraisers in the Jackson Hole, Wyoming labor market area.

By letter dated July 23, 1998, the vocational rehabilitation specialist, William Simmons, considered that appellant had been working with Mr. Zook since April 14, 1997 and he had provided him with a plan to work and retrain as a real estate appraiser. Mr. Simmons stated that the plan could not be approved. He stated a vocational rehabilitation plan sponsored by the Office must be suitable for appellant and reasonably available within commuting distance of his home. Mr. Simmons explained that the job was not suitable because according to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the real estate appraisal work requires lifting up to 20 pounds, which conflicts with his 10-pound lifting restriction. He also stated that the proposed rehabilitation plan the labor market listed real estate appraisal jobs in Jackson Hole, Wyoming rather than in appellant's home of Kalispell, Montana. Further, Mr. Simmons stated that much of the real estate appraisal job market was comprised of self-employment or commission-based employment and those kinds of employment were "typically considerable only following a determination that suitable salaried work" was not available. He, therefore, stated that he was assigning appellant to a new rehabilitation counselor, Herbert G. Keating.

In a report dated October 15, 1998, Mr. Keating stated that there were a significant number of real estate appraisers, 53 total, in the Kalispell, Montana area but the majority of them were independent contractors.

By letter dated October 15, 1998, Mr. Simmons stated that jobs targeted in a rehabilitation plan need to be salaried employment.

In a vocational rehabilitation report dated November 23, 1998, Mr. Keating identified the jobs of retail manager and program manager as jobs that appellant had the professional qualifications to perform, were within his physical restrictions and were reasonably available in the geographic area where appellant resides. According to DOT, the retail manager job involved managing a retail store engaged in selling a specific line of merchandise such as groceries, meat, liquor, apparel, furniture or jewelry and planning and preparing work schedules and assigning employees to specific duties. Mr. Keating said the physical demands were light requiring lifting up to 10 pounds frequently and occasionally up to 20 pounds. He stated that the vocational preparation was two to four years. Mr. Keating considered that appellant had a bachelor's degree in wildlife biology and 11 years of supervisory and managerial experience as a park ranger, which included supervising other park rangers and volunteers and performing recruitment, selection, training, counseling and staff performance evaluations. He also considered that appellant managed financial programs for the Coulter Bay Campground operations and a park-wide reimbursable ambulance account including planning and budgeting. Mr. Keating found that due to his education and supervisory and managerial experience, appellant was professionally qualified to perform the job of retail manager.

Mr. Keating noted that appellant had established a vocational goal of becoming certified as a rural real estate appraiser but stated that appellant could not afford to take the training classes without the Office's assistance.

In a report dated December 1, 1998, appellant's treating physician, Dr. Michael Righetti, a Board-certified orthopedic surgeon, stated that appellant should avoid heavy lifting of up to 40 or 50 pounds and should not stoop, bend and climb.

In a vocational report dated January 8, 1999, Mr. Simmons stated that appellant had not signed Mr. Keating's November 23, 1998 vocational report targeting the jobs of program manager and retail manager. He said that Mr. Keating conveyed that appellant would like a determination on his goal of real estate appraisal work. Mr. Simmons explained that he had informed appellant in his July 23 and October 15, 1998 letters, that the job goal of real estate appraiser was not acceptable and emphasized that targeted jobs must be salaried positions. He again requested that appellant sign Mr. Keating's rehabilitation plan.

By letter dated January 15, 1999, appellant stated that he was "holding on to the possibility of gaining some training as a real estate appraiser" because Mr. Simmons' office had "never said definitively that this was not an option." He said that Mr. Keating had told him that suitable salaried work was not available in his geographic area and he thought that might open the door for him to consider self-employment and commissioned based pay as "the next logical step in" his rehabilitation process. Appellant stated that the jobs of program manager or retail manager were "out of the realm" of his "previous experience, training, aptitudes and interests" and he felt he was being coerced into signing the plan.

By letter dated January 26, 1999, Dr. Righetti stated that he had reviewed appellant's chart and job descriptions for program manager and retail store manager and Dr. Righetti approved them in view of appellant's limitations.

In a vocational report dated February 17, 1999, Mr. Simmons reiterated that appellant could perform the job of retail manager. He stated that appellant signed the rehabilitation plan for the job on January 27, 1999 but on February 10, 1999 stated that he signed the rehabilitation plan "under duress due to the threat of [his] benefits being reduced or cut off." Mr. Simmons stated that appellant had "emphatically" stated on the vocational rehabilitation plan that he did not approve of the provisions of the plan and he did not believe that the plan would "help him to get and keep suitable employment." Mr. Simmons stated that he and the claims examiner concluded on February 16, 1999 that they could not have "sufficient confidence that rehabilitation sponsorship would result in [appellant's] return to work." He stated that the rehabilitation effort was closed as of February 16, 1999.

By decision dated March 24, 1999, the Office adjusted appellant's compensation to reflect his wage-earning capacity in the position of retail manager.

By letter dated February 17, 2000, appellant requested reconsideration of the Office's decision.

By decision dated March 23, 2000, the Office denied appellant's request for reconsideration.

By letter dated March 29, 2000, appellant requested reconsideration of the Office's decision. Appellant stated that the rehabilitation counselor he had been assigned, without mentioning any name, was guilty of two ethics violations by his certifying agency. The violations were that he failed to evaluate potential employment opportunities and to consider jobs and circumstances that were consistent with his abilities, interests and general qualifications.

By decision dated June 16, 2000, the Office denied appellant's request for modification.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the positions of program manger and retail manager.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.¹

Under section 8115(a) of Federal Workers' Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.² The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.³

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁴ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁵ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

On November 23, 1998 the rehabilitation counselor, Mr. Keating, identified the job of retail manager as a job that appellant could physically perform, had the professional qualifications to perform and was reasonably available within the geographic area where he resides. Appellant's treating physician, Dr. Righetti, opined that appellant should not perform heavy lifting or lifting up to 40 or 50 pounds and on January 26, 1999 opined that the job of retail manager was within appellant's physical limitations. In his November 23, 1998 report, Mr. Keating noted that the job of retail manager required two to four years of vocational preparation but stated that appellant, who had a bachelor's degree in wildlife biology and extensive supervisory and managerial experience as a park ranger, met this qualification.

¹ *Francesco Bermudez*, 51 ECAB ____ (Docket No. 98-1395, issued May 11, 2000).

² *James Smith*, 52 ECAB ____ (Docket No. 00-1103, issued October 25, 2001); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

³ *Id.*

⁴ *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

⁵ *Dorothy Lams*, *supra* note 4; *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also*, 20 C.F.R. § 10.303.

Despite appellant's repeated assertions that the job of retail manager was not suitable for him and his suggestion that the Office improperly rejected Mr. Zook's rehabilitation plan targeting the job of real estate appraiser, the Office had the discretion to reject Mr. Zook's plan. The reasons the Office gave for rejecting Mr. Zook's plan were that real estate jobs pay on a commissioned basis or require self-employment and that the real estate jobs Mr. Zook identified and the training required were not in the state of Montana where appellant resides. The record does not show that all the real estate jobs paid on a commissioned basis or required self-employment but Mr. Zook's report showed that they were located in Jackson Hole, Wyoming and the training required was in Denver, Colorado. Mr. Keating stated that the majority of the real estate jobs in Kalispell, Montana were independent contractors. The Office, therefore, reasonably chose to reject Mr. Zook's rehabilitation plan and to refuse to identify the job of real estate appraiser as a target job. Appellant did not submit any evidence to support his contention that one of the rehabilitation counselors committed ethics violations in providing rehabilitation services for him.⁶ Further, the evidence of record consisting of Dr. Righetti's physical restrictions and Mr. Keating's vocational findings that appellant had the professional qualifications to perform the job of retail manager and the job was reasonably available supports the Office's finding that the retail manager job was suitable for appellant and represents his wage-earning capacity.

The June 16 and March 23, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 16, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ At the oral argument, appellant submitted a letter dated March 22, 2000, purportedly showing that Mr. Keating committed ethics violations but this letter was not in the record before the Office and the Board may not review it. *See Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999).